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In The

Supreme Court of the United States

CATHOLIC HEALTHCARE WEST,
CATHOLIC HEALTHCARE WEST ARIZONA,
and MICHAEL BERENS,

Petitioners,

v.

UNITED STATES OF AMERICA ex rel.
PATRICIA HAIGHT and IN DEFENSE OF ANIMALS,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether documents obtained by a *qui tam* relator pursuant to the Freedom of Information Act constitute public disclosures within the meaning of the False Claims Act's jurisdictional bar, 31 U.S.C. § 3730(e)(4)(A).

PARTIES

Petitioners are Catholic Healthcare West, Catholic Healthcare West Arizona, and Michael Berens. Respondents are Patricia Haight and In Defense of Animals, who pursue this action on behalf of the United States of America. The United States has declined to intervene in this action. *See* 31 U.S.C. § 3730(b)(4)(B).

RULE 29.6 STATEMENT

Catholic Healthcare West is a not-for-profit entity that has no parent corporation, and no publicly held company owns ten percent or more of its stock. Catholic Healthcare West Arizona was a predecessor, prior to a merger, of Catholic Healthcare West and no longer is a separate legal entity.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
PARTIES	ii
RULE 29.6 STATEMENT	ii
TABLE OF AUTHORITIES	iv
PETITION FOR A WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY PROVISION INVOLVED	1
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE PETITION	7
I. THE CIRCUITS ARE SPLIT	8
II. THE NINTH CIRCUIT ADOPTED A KNOWLEDGE STANDARD THAT IS INCONSISTENT WITH DECISIONS FROM OTHER COURTS OF APPEALS	11
III. THE FEDERAL ISSUE PRESENTED IS IMPORTANT	15
CONCLUSION	18

TABLE OF AUTHORITIES

Page

CASES

Federal Recovery Servs., Inc. v. United States, 72 F.3d 447 (5th Cir. 1996) 14

Hughes Aircraft Co. v. United States ex rel. Schumer, 520 U.S. 939 (1997) 5

Miner v. Atlass, 363 U.S. 641 (1960) 10

United States ex el. Reagan v. East Texas Med. Ctr., 384 F.3d 168 (5th Cir. 2004) 9, 10

United States ex rel. Burns v. A.D. Roe Co., 186 F.3d 717 (6th Cir. 1999) 10

United States ex rel. Devlin v. California, 84 F.3d 358 (9th Cir. 1996) 4

United States ex rel. Doe v. John Doe Corp., 960 F.2d 318 (2d Cir. 1992) 4

United States ex rel. Feingold v. AdminaStar Fed., Inc., 324 F.3d 492 (7th Cir. 2003) 13

United States ex rel. Findley v. FPC-Boron Employees' Club, 105 F.3d 675 (D.C. Cir. 1997) 2, 3, 4

United States ex rel. Found. Aiding the Elderly v. Horizon West, Inc., 265 F.3d 1011 (9th Cir. 2001) 14

United States ex rel. Kreindler & Kreindler v. United Techs. Corp., 985 F.2d 1148 (2d Cir. 1993) 9, 14

United States ex rel. Marcus v. Hess, 317 U.S. 537 (1943) 3, 9, 16

United States ex rel. Merena v. SmithKline Beecham Corp., 114 F. Supp. 2d 352 (E.D. Pa. 2000) 4

United States ex rel. Mistick PBT v. Housing Auth., 186 F.3d 376 (3d Cir. 1999) 8, 9, 10, 17

TABLE OF AUTHORITIES – Continued

Page

United States ex rel. Siller v. Becton Dickinson & Co., 21 F.3d 1339 (4th Cir. 1994) 13

United States ex rel. Springfield Terminal Ry. Co. v. Quinn, 14 F.3d 645 (D.C. Cir. 1994) 4, 9, 13

United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co., 944 F.2d 1149 (3d Cir. 1991) 13

United States ex rel. Wisconsin v. Dean, 729 F.2d 1100 (7th Cir. 1984) 3

STATUTES, SESSION LAWS, AND RULE

28 U.S.C. § 1254(1) 1

31 U.S.C. § 3729(a) 2

31 U.S.C. §§ 3729-33 2

31 U.S.C. § 3730(a-d) 2

31 U.S.C. § 3730(b)(4) 6

31 U.S.C. § 3730(e)(4) ..... *passim*

Act of March 2, 1863, ch. 67 § 4, 12 Stat. 698 2

Act of Dec. 23, 1943, 57 Stat. 608 3

Fed. R. Civ. P. 12(b)(1) 6

OTHER

John T. Boese, *Civil False Claims and Qui Tam Actions* (3d ed. 2005) 16

Department of Justice Pub., *Summary of Annual FOIA Reports for Fiscal Year 2003* (www.usdoj.gov/oip/foiapost/2004foiapost22.htm) 16

PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The decision of the court of appeals is reported at 445 F.3d 1147 and is reproduced at App. 1-19. The order of the court of appeals denying a petition for rehearing *en banc* is unreported and is reproduced at App. 25. The decision of the district court is unreported and is reproduced at App. 20-24.

JURISDICTION

The court of appeals' judgment was entered on April 19, 2006. A timely petition for rehearing *en banc* was denied on May 30, 2006. App. 25. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

31 U.S.C. § 3730(e)(4):

> (A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the

action is brought by the Attorney General or the person bringing the action is an original source of the information.

(B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

STATEMENT OF THE CASE

1. This case concerns the "public disclosure bar" of the False Claims Act ("FCA" or the "Act"), 31 U.S.C. §§ 3729-33. Originally enacted during the Civil War to combat fraud by those who sold supplies to the Union Army, the FCA imposes liability for false or fraudulent claims for payment to the federal government. *Id.* § 3729(a). An important feature of the Act is that it authorizes private parties, or "relators," to bring "*qui tam*" actions on behalf of the government and potentially to keep a portion of any recovery. *See id.* § 3730(a-d).

The FCA's *qui tam* provisions, as originally enacted, allowed any private party with knowledge of a fraud against the government to bring suit in the name of the government. *United States ex rel. Findley v. FPC-Boron Employees' Club*, 105 F.3d 675, 679 (D.C. Cir. 1997) (citing Act of March 2, 1863, ch. 67 § 4, 12 Stat. 698). These provisions were used extensively in the 1930s and 1940s, "when increased government spending opened up numerous opportunities for unscrupulous government contractors to defraud the government." *Id.* This period was

marked by "parasitic lawsuits," in which "opportunistic private litigants chased after generous cash bounties" by merely copying allegations of fraud from existing indictments or congressional investigations. *Id.* at 679-80. In 1943, this Court decided *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943), permitting a *qui tam* suit in which the relator copied his complaint directly from a criminal fraud indictment.

Congress reacted later that year by amending the Act to bar all *qui tam* suits "based upon evidence or information in the possession of the United States . . . at the time such suit was brought." *Findley*, 105 F.3d at 680 (citing Act of Dec. 23, 1943, 57 Stat. 608). This amendment ultimately proved quite restrictive. Courts held that the 1943 amendments precluded *qui tam* actions even where the government was in possession of evidence or information of fraud solely because the putative relator had provided it to the government. *See, e.g., United States ex rel. Wisconsin v. Dean*, 729 F.2d 1100 (7th Cir. 1984) (discussed in *Findley*, 105 F.3d at 680).

"After ricocheting between the extreme permissiveness that preceded the 1943 amendments and the extreme restrictiveness that followed," Congress in 1986 again amended the FCA's *qui tam* provisions. *Findley*, 105 F.3d at 680. In its present form, the statute deprives courts of jurisdiction over *qui tam* actions that are "based upon" a "public disclosure," unless the relator is an "original source" of the publicly disclosed information. The relevant statutory language is as follows:

> No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional,

> administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

31 U.S.C. § 3730(e)(4)(A).

The D.C. Circuit has described the 1986 amendments as seeking "the golden mean between adequate incentives for whistle-blowing insiders with genuinely valuable information and discouragement of opportunistic plaintiffs who have no significant information to contribute of their own." *United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 649 (D.C. Cir. 1994). The other courts of appeals are, generally, in agreement with this description. *See, e.g., United States ex rel. Devlin v. California*, 84 F.3d 358, 362 (9th Cir. 1996); *United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318, 321 (2d Cir. 1992). This is, however, where much of the intercircuit agreement ends. The public disclosure bar has led to extensive litigation and is the subject of many reported judicial opinions, not all of which are consistent. *See generally Findley*, 105 F.3d at 681. Despite repeated expressions of frustration by judges called upon to interpret the *qui tam* provisions, *see, e.g., United States ex rel. Merena v. SmithKline Beecham Corp.*, 114 F. Supp. 2d 352, 371-72 (E.D. Pa. 2000) ("questions [about the public disclosure bar] continue to plague and perplex litigants and the courts"), Congress has left the language in place for twenty years. This Petition addresses a circuit split on the important question whether documents obtained by a relator pursuant to the

Freedom of Information Act ("FOIA") constitute public disclosures within the meaning of the statute.[1]

2. Petitioner Dr. Michael Berens is a research scientist. He was, at the time relevant to this action, employed by Petitioner Catholic Healthcare West Arizona at its Barrow Neurological Institute in Phoenix, Arizona. He is attempting to find treatment options for human brain cancer. In 1997, Dr. Berens submitted a grant application to the National Institutes of Health. NIH funded his research for three years, beginning in 1998.

Respondents Patricia Haight and In Defense of Animals (collectively "Relators" herein) are self-described animal rights activists. They have vigorously and passionately protested Dr. Berens' research, which involved animal research subjects. Relators were not involved in Dr. Berens' research. Nor were they involved in any way in his preparation and submission of the 1997 grant application. Indeed, they were not even aware of his research until years after it had begun.

Haight learned about Dr. Berens' research in March 2000 from a group of students at Arizona State University. Soon thereafter, Relators engaged in a number of activities targeting Dr. Berens, including an unsuccessful attempt to persuade county officials to file animal cruelty charges against him. In June 2000, pursuant to a request under

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[1] This Court previously granted certiorari in a case presenting, *inter alia*, a question similar to the one presented here – whether the availability of a document pursuant to FOIA is sufficient to trigger the public disclosure bar – but did not need to reach that question because it concluded that the 1986 amendments to the FCA are not retroactive. *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939 (1997).

FOIA, Haight obtained a copy of Dr. Berens' 1997 grant application. Relators sifted through the grant application and extracted statements they claim to be fraudulent. They also used FOIA to obtain additional documents about Dr. Berens' research, and they held press conferences and issued press releases in which they alleged deficiencies in the research. These activities led to the publication, in 2000 and early 2001, of news articles about defendants' research and Relators' views about that research.

3. Following these events, on March 31, 2001, Relators filed an FCA action in the district court, asserting that the grant application they had obtained through FOIA contained false statements. The United States declined to intervene, *see* 31 U.S.C. § 3730(b)(4)(B), leaving maintenance of the lawsuit to Relators.

During the discovery phase of the proceedings, defendants filed a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1), arguing that the district court lacked subject-matter jurisdiction under the public disclosure bar. With respect to the grant application, which contains the statements that Relators claim are false, defendants argued that the grant application met the statutory requirements for a "public disclosure" because it had been disclosed to Relators pursuant to a FOIA request. Relators responded by arguing, among other things, that disclosure of documents pursuant to FOIA is not sufficient to trigger the public disclosure bar. The district court granted the motion and dismissed for lack of subject-matter jurisdiction. App. 24.

4. The court of appeals reversed. It held that the grant application was not a public disclosure within the

meaning of the statute. The court rejected the argument that the government's response to a FOIA request occasions or constitutes an administrative "investigation" or "report." App. 11-18. The court held that the public disclosure bar is triggered only if a document obtained through FOIA is itself a "criminal, civil, or administrative hearing, . . . a congressional, administrative, or [General] Accounting Office report, hearing, audit, or investigation, or [is] from the news media." App. 18. The court acknowledged that, in so holding, it was creating a conflict with published decisions from other courts of appeals, which have held that FOIA inquiries and responses are administrative "investigation[s]" or "report[s]," such that information in the government's own files obtained by a putative relator pursuant to FOIA meets the statutory requirements for a public disclosure. App. 11-12 The court rejected those decisions, finding its contrary view to be compelled by the plain language and legislative history of the Act. App. 12-16. The court denied defendants' subsequent petition for rehearing *en banc*. App. 25.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit's opinion in this case is in direct conflict with published decisions from the Third and Fifth Circuits. Moreover, to reach its result, the court embraced an expansive and problematic view of federal court jurisdiction under the FCA that is inconsistent with the analysis of other courts of appeals. The federal issue on which the circuits are now split as a result of the decision below is important, legal, and concerns subject-matter jurisdiction under the FCA. The split is genuine and unlikely to be resolved absent review by this Court.

I. THE CIRCUITS ARE SPLIT

In *United States ex rel. Mistick PBT v. Housing Authority*, 186 F.3d 376 (3d Cir. 1999), the relator-plaintiff alleged that a housing authority and others submitted false claims for payment to the United States Department of Housing and Urban Development. As in this case, the plaintiff used FOIA to obtain the documents containing the alleged false claims. *See id.* at 381. The district court dismissed the action pursuant to the public disclosure bar, and the plaintiff argued on appeal (as did the Relators here) that the "FOIA request was not one of the kinds of public disclosure that trigger the jurisdictional bar set out in 31 U.S.C. § 3730(e)(4)(A)." *Ibid.* In a thorough opinion by Justice (then-Judge) Alito, the Third Circuit rejected the relator's argument.

As in this case, the documents upon which the relator sought to base his *qui tam* action were not themselves "reports" or "investigations." *See id.* at 381. The Third Circuit concluded, however, that a FOIA request results in both an "administrative . . . report" and an "administrative . . . investigation" within the meaning of section 3730(e)(4)(A). *Id.* at 383-84. Accordingly, the court held that information obtained by a relator pursuant to FOIA necessarily constitutes a "public disclosure" within the meaning of the Act. *Ibid.* The court reached this result after applying commonly understood dictionary definitions of the terms "report" and "investigation." *Ibid.* Responding to a lengthy dissent, the court noted the relator offered no alternative definitions to challenge the commonly understood meaning of these terms. *Id.* at 384. In observations that apply equally to the Ninth Circuit's analysis in this case (*see* App. 12-13), the court said that "the dissent seem[ed] to have in mind a particular type of government

report, with 'analysis,' a 'summary,' and/or a 'conclusion' . . . but the ordinary understanding of the term 'report' is broader." *Id.* at 384 n.4 (internal page reference omitted); *see also id.* n.6 ("According to the dissent, the term "investigation" seems to be limited to a criminal investigation or a like investigation of 'wrongdoing'. . . . But in ordinary usage, the term is used more broadly.").[2]

In *United States ex el. Reagan v. East Texas Medical Center*, 384 F.3d 168 (5th Cir. 2004), the court similarly considered whether documents obtained by a relator pursuant to FOIA were public disclosures within the meaning of the FCA's jurisdictional bar. After discussing the Third Circuit's opinion in *Mistick*, the court said, "we are persuaded by the reasoning of *Mistick* and hold that the response to [relator's] FOIA request is an administrative report constituting a public disclosure under § 3730(e)(4)(A)." *Id.* at 176.

The split is, accordingly, direct and genuine. In each of the decisions on the other side of the split, the courts considered precisely the same issue that the Ninth Circuit considered here, and each reached the opposite conclusion on analogous facts. As a result, some defendants now are

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[2] The Third Circuit's analysis is consistent with the prevailing understanding that the words in the public disclosure bar must be given a broad reading. One of the first issues to arise after the 1986 amendments was whether the word "hearing" in section 3730(e)(4)(A) is broad enough to encompass written court documents. Courts recognized that a failure to equate the word "hearing" with, roughly, "proceeding" would lead to an absurd result. A written indictment was, after all, the public disclosure at issue in *United States ex rel. Marcus v. Hess, supra* – the quintessential "parasitic" lawsuit that Congress has, since 1943, intended to preclude. *See Springfield Terminal Ry. Co.*, 14 F.3d at 652; *United States ex rel. Kreindler & Kreindler v. United Techs. Corp.*, 985 F.2d 1148, 1157-58 (2d Cir. 1993).

subject to suit under the FCA, and others not, based solely on the happenstance of where they reside or can be sued. Forum shopping is inevitable. Moreover, circuit splits on matters of federal subject-matter jurisdiction are unseemly, because they mean that courts in one part of the country are hearing cases that courts in other parts of the country believe they lack the power to hear. *Cf. Miner v. Atlass*, 363 U.S. 641, 650 (1960) ("nationwide uniformity" in the "field of federal jurisdiction . . . has traditionally always been highly esteemed").

The Ninth Circuit acknowledged that it was creating a circuit split, noting its disagreement with *Mistick* and *Reagan*. App. 11-12.[3] Petitioners filed a petition for rehearing *en banc*, asking the full court to resolve the conflict, but the court declined rehearing. App. 25. Accordingly, in the absence of intervention by this Court, the intercircuit conflict created by the decision below is unlikely to resolve itself.

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[3] The Ninth Circuit also appears to have concluded that its decision was in conflict with the Sixth Circuit's opinion in *United States ex rel. Burns v. A.D. Roe Co.*, 186 F.3d 717, 723-24 (6th Cir. 1999). *See* App. 12. While the Sixth Circuit in *Burns* held that disclosure through FOIA is disclosure to the "public," 186 F.3d at 723-24, it treated as a separate question (which it did not resolve) whether such a disclosure occurs in connection with an administrative "report" or "investigation," *id.* at 725. It is, accordingly, probably not accurate to view *Burns* as in direct conflict with the Ninth Circuit's decision below. In any event, most of the discussion in *Burns* is *dicta* and appears to be little more than a survey of the law. The court ultimately remanded the case, because it was unclear whether the allegations in the *qui tam* complaint were based upon the FOIA information. *Id.* at 726.

II. THE NINTH CIRCUIT ADOPTED A KNOWLEDGE STANDARD THAT IS INCONSISTENT WITH DECISIONS FROM OTHER COURTS OF APPEALS

The Ninth Circuit found its interpretation of the FCA's jurisdictional bar buttressed by its conclusion that the statute's language manifests Congress's intent to preclude *qui tam* actions only where "the government already could be expected to be on notice of the fraud." App. 15. The court determined that the government does not have a sufficient "degree of familiarity and cognizance" with respect to information in documents disclosed pursuant to FOIA to trigger the public disclosure bar, because it "need not assimilate the information contained in the . . . documents." App. 16. In other words, the court determined that in deciding questions about the meaning of the words in section 3730(e)(4)(A), courts should be guided by whether the government was aware of, or had "assimilated," the information at issue.

A FOIA document is, of course, known to the government, because it comes from the government's own files. Indeed, the document at issue here – a grant application – necessarily must have been both read and considered by the government, because the grant ultimately was awarded. Moreover, documents disclosed pursuant to FOIA are not merely tucked away in file cabinets somewhere, but have expressly been called to the government's attention by the requesting party before their disclosure. Thus, in ruling that the government does not have sufficient "familiarity and cognizance" with respect to FOIA documents, the Ninth Circuit has set an exceptionally high standard for the level of awareness of a document

that the government must possess to trigger the public disclosure bar.

As an initial matter, the Ninth Circuit's suggestion that Congress intended application of the public disclosure bar to turn on the government's "familiarity and cognizance" with respect to a particular document is suspect and inconsistent with the structure of the FCA itself. The public disclosure bar expressly applies to disclosures "from the news media," 31 U.S.C. § 3730(e)(4)(A), of which the government may or may not actually be aware. If Congress had intended to adopt the knowledge standard read into the statute by the Ninth Circuit, it is unlikely also to have precluded *qui tam* FCA actions based on information that has merely appeared somewhere in the news.[4]

In addition to being most probably erroneous, the Ninth Circuit's focus on whether or not the government knows about a particular document is inconsistent with decisions of other courts of appeals. Those courts, in attempting to interpret the meaning of words such as "hearing" or "report" in section 3730(e)(4)(B), have noted that the relevant issue is not whether the government is actually aware of particular information, but whether the information is in the public domain. For example, the Seventh Circuit has expressly rejected the argument that

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[4] The court appears to have recognized this problem with its analysis, but its answer was terse: "While information in the news media does not necessarily originate from the government, it is so public that the government can be presumed to be on notice of it." App. 15 n.4. There is no reason to expect Congress thought the government would have a greater degree of "familiarity and cognizance" with respect to matters that have merely appeared somewhere in a news article than the government has with respect to its own documents in its own files that have been called to its attention in a FOIA request.

a government lawyer must be actually aware of publicly disclosed information in an administrative report, holding as follows: "That a particular attorney of [an] agency may not know of [the] information is of no moment; what concerns this analysis is whether the critical information was in the public domain. . . . [A]n allegation or transaction can be publicly disclosed under the FCA even where a representative of the Government is unaware of any public disclosures." *United States ex rel. Feingold v. AdminaStar Fed., Inc.*, 324 F.3d 492, 496 (7th Cir. 2003) (internal quotation to lower court opinion omitted). Similarly, the Third Circuit has suggested that the relevant inquiry under the statute is whether the information at issue was "equally available to strangers to the fraud transaction had they chosen to look for it as it was to the relator." *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co.*, 944 F.2d 1149, 1155-56 (3d Cir. 1991).[5]

Applying similar reasoning, "every court of appeals to have addressed the question" has concluded that information disclosed in civil litigation and on file with a court constitutes a "public disclosure" within the meaning of the FCA. *United States ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339, 1350 (4th Cir. 1994) (collecting cases). Thus,

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[5] In support of its knowledge standard, the Ninth Circuit relied on *United States ex rel. Springfield Terminal Ry. Co., supra*. *See* App. 15-16. While the D.C. Circuit in that case discussed extensively the quantum of information that must be available to the government to trigger the public disclosure bar, it primarily focused on whether the information was in the public domain, not on whether the government had actually assimilated the information. *See* 14 F.3d at 654 ("Congress . . . navigated between . . . two extremes . . . to create a standard under which *qui tam* actions are barred only when enough information exists in the public domain to expose the fraudulent transaction. . . .").

the fact that information filed in civil litigation between private parties can be found in a clerk's office file is sufficient, in every circuit that has considered the matter, to preclude a *qui tam* action under the public disclosure bar. *E.g., United States ex rel. Kreindler & Kreindler v. United Techs. Corp.*, 985 F.2d 1148, 1158 (2d Cir. 1993) (statute was designed to preclude suits based on information "gleaned in litigation" and "on file in [a] clerk's office") (internal citation and quotation omitted); *Federal Recovery Servs., Inc. v. United States*, 72 F.3d 447, 450 (5th Cir. 1996) ("[a]ny information disclosed through civil litigation and on file with the clerk's office should be considered a public disclosure of allegations in a civil hearing for purposes of section 3730(e)(4)(A)") (internal citation and quotation omitted).[6]

The Ninth Circuit's decision here cannot harmoniously coexist with these cases. Surely the government cannot be expected to be more aware of what happens in all private civil litigation throughout the country than it is aware of the contents of federal grant applications or other documents within its own files called to its attention in a FOIA request. Accordingly, not only does the Ninth Circuit's decision present a direct circuit split on the important issue whether FOIA disclosures constitute "public disclosures," its focus on whether the government was

[6] Indeed, even the Ninth Circuit appears previously to have concluded that documents filed in private civil litigation constitute public disclosures. *E.g., United States ex rel. Found. Aiding the Elderly v. Horizon West, Inc.*, 265 F.3d 1011, 1015-16 (9th Cir. 2001) (suggesting that a complaint filed in civil litigation could constitute a public disclosure within the meaning of the Act, but not ruling on the issue because the allegations in the civil complaint were not sufficiently similar to those in the FCA complaint).

aware of, or had assimilated, a particular document also will inevitably create or exacerbate further divisions among the circuits.

III. THE FEDERAL ISSUE PRESENTED IS IMPORTANT

By their own admission, Relators were not insiders with respect to Dr. Berens' research. Indeed, they did not even know about his grant application until two and one-half years after it was submitted to NIH. Relators are animal rights activists who, after using other methods to attempt to derail Dr. Berens' research, obtained his grant application through FOIA and then consulted other public information to attempt to claim that certain statements in the grant application are misleading.

The Ninth Circuit understood that, in allowing Relators' claims to go forward, it was adopting an expansive view of *qui tam* jurisdiction. Indeed, the court described that result as a "happy effect" of its decision: "Permitting claims based on otherwise private information obtained via a FOIA request to go forward also has the happy effect of encouraging private citizens with suspicions of fraud to take the most expeditious route toward uncovering information related to that fraud and hastening recovery for the government." App. 16-17 n.5.

The Ninth Circuit's extension of *qui tam* jurisdiction to cases where relators merely suspect fraud and are able to "uncover[]" it after using FOIA to look through the government's own files is inconsistent with the careful balance struck by Congress in the 1986 amendments.

Indeed, the Ninth Circuit's analysis harkens back to the since-rejected era of *United States ex rel. Marcus v. Hess*, *supra*, when a *qui tam* action could be based upon the government's own information, which is what happens when a relator must rely on FOIA in order to bring an FCA action.

The FCA already is an often-used statute, with hundreds of new *qui tam* actions filed each year. *See* 2 John T. Boese, *Civil False Claims and Qui Tam Actions*, Appendix H at H-2 (3d ed. 2005) ("Boese Treatise") (showing approximately 300 to 500 new *qui tam* actions filed each year in the past decade). The decision below is likely to occasion a significant increase in these numbers in the Western states, and also can be expected to increase the number of FOIA requests made by putative relators to bring FCA actions and chase *qui tam* bounties.[7] While the Ninth Circuit described its expansion of *qui tam* jurisdiction as a "happy effect," the reality is that most *qui tam* actions are meritless. In resolved *qui tam* cases filed after the 1986 amendments in which the government has declined to intervene, the relators have obtained a settlement or judgment only about six percent of the time.[8] The

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[7] FOIA already imposes a considerable burden on federal agencies. *See* Department of Justice Pub., *Summary of Annual FOIA Reports for Fiscal Year 2003* (www.usdoj.gov/oip/foiapost/2004foiapost22.htm) (showing that, for Fiscal Year 2003, the federal government received 3,266,394 FOIA requests, devoted the equivalent of 5,007.61 employee work-years to handling FOIA requests, and spent more than $323 million on FOIA activities).

[8] Department of Justice statistics as of September 30, 2005 indicate that out of the 2,893 *qui tam* actions that have been filed since the 1986 amendments and in which the government declined to intervene, 2,716 have been dismissed and only 177 (or about six percent) have been resolved by settlement or judgment. *See* Boese Treatise, Appendix H at H-6.

nature of FOIA ensures that almost anyone can do what Relators did here – obtain grant applications or other government documents relating to those with whom they have political (or philosophical or commercial) disagreements and then bring disruptive lawsuits.

The Third Circuit recognized the very point in the *Mistick* case:

> Just as civil discovery is public, it must be the case that information obtained pursuant to a[] FOIA request has been made public through the administrative process and cannot form the basis of a qui tam action. If that were not the case then, like court records, public agency records would be flooded with citizens requesting information in order to bring qui tam suits. Congress did not intend the qui tam provision to transform FOIA from sunshine legislation into a search for the pot of gold at the end of the rainbow.

Mistick, 186 F.3d at 385 (quoting *United States ex rel. Herbert v. Nat'l Academy of Sciences*, 1992 WL 247587, at *6 (D.D.C. Sept. 15, 1992).) The Ninth Circuit's disagreement with its sister circuits is, in sum, a significant decision that, we respectfully submit, warrants the attention of this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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445 F.3d 1147

UNITED STATES of America,
Plaintiff,

and

Patricia Haight, ex rel. and in
Defense of Animals, Plaintiff-Appellant,

v.

CATHOLIC HEALTHCARE WEST;
Catholic Healthcare West Arizona;
Michael Berens, Defendants-Appellees.

No. 03-16937.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Sept. 13, 2005.

Filed April 19, 2006.

Jeremy L. Friedman, Law Office of Jeremy L. Friedman, Oakland, CA, for the appellants.

Lawrence A. Kasten, Lewis and Roca LLP, Phoenix, AZ, for the appellees.

Appeal from the United States District Court for the District of Arizona; Frederick J. Martone, District Judge, Presiding. D.C. No. CV-01-02253-FJM.

Before: B. FLETCHER, JOHN R. GIBSON,* and BERZON, Circuit Judges.

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* The Honorable John R. Gibson, Senior United States Circuit Judge for the E[illegible] Circuit, sitting by designation.

B. FLETCHER, Circuit Judge:

Dr. Patricia Haight and the organization In Defense of Animals (collectively "Relators") appeal the dismissal of their complaint for lack of subject matter jurisdiction under the False Claims Act's "public disclosure" jurisdictional bar, 31 U.S.C. § 3730(e)(4). We reverse.

I.

Relators brought this *qui tam* action under the False Claims Act ("FCA"), 31 U.S.C. §§ 3729-33, against Catholic Healthcare West and Dr. Michael Berens (collectively "Defendants"). The Relators allege that Berens submitted a fraudulent grant application to the National Institutes of Health ("NIH"). Based on this application, he was awarded over $700,000 in grant money.

Defendant Berens is a research scientist at Barrow Neurological Institute, a division of Catholic Healthcare West. Berens is the primary researcher on a project that uses beagle dogs to research glioma, a form of malignant brain tumor. The study is designed to develop a large animal model for studying glioma and then extrapolate any knowledge gained to treat glioma in humans. Berens attempted to develop the model by injecting glioma tumor cells into the flanks of gestating beagle puppies. This procedure had to be done during gestation to prevent the immune systems of the puppies from rejecting the gliomal cells and was designed to cause tumors to develop after the puppies were born, which could then be transplanted into their brains. Initially, Berens' research was privately funded. Later he sought public funding. Berens' first grant application to the NIH was rejected, but his

second application was approved, resulting in an award of over $700,000 in grant money.

Relator Haight is an experimental psychologist and the Southwest Regional Director of In Defense of Animals. Haight performed extensive research on Berens' study and uncovered the fraud alleged in the complaint. Haight began investigating Berens' research at the request of a student and community members who were protesting animal research conducted at Barrow and Arizona State University ("ASU"). She first identified the funding source for Berens' study – the National Institute of Neurological Disorders and Strokes, an institute within the larger NIH – and requested documents relating to the study pursuant to the Freedom of Information Act ("FOIA"). She was subsequently informed that she could obtain the documents from her FOIA request directly from Barrow, where Berens' study was being performed, so she walked down personally to obtain them. The documents she obtained because of her FOIA request included the 1997 grant application and continuation forms, and a paper and paper abstract by Berens.

Haight then requested documents from ASU, where the project had formerly been housed, including animal care records and minutes from the Institutional Animal Care and Use Committee ("IACUC") meetings, where animal research projects are vetted. In response to this request, Haight received protocols submitted to ASU by Berens starting in 1990, animal care records, IACUC minutes, and correspondence between Berens and IACUC concerning Berens' withdrawal of the project from ASU in 1997.

Becoming concerned about the efficacy of the project, Haight arranged to tour the ASU facility where the dogs had been housed and the Veterans Administration hospital to which the dogs were transferred when Berens' project ceased to have the support of ASU. She also interviewed numerous individuals who provided information about Berens' research, including Edward Castaneda, Chairman of the IACUC at ASU; Ted Brandon, Director of ASU's Animal Care Program; Neal DeNardo, ASU Veterinarian; Ronald Barr, Assistant Vice Provost for Research at ASU and IACUC member; Tol Chesko, IACUC member; Joan McGregor, ASU faculty member; and graduate student Clare Rhodes. In conjunction with her tour of the VA facility, Haight interviewed Jedd Nelson, Director of Animal Care. Haight contacted Geoffrey Pilkington, Professor of Experimental Neuro-oncology at King's College of London, who was listed as a consultant to Berens' project on the NIH application. Haight also met with Joan Rankin Shapiro, Vice President for Research at Barrow Neurological Institute.

In the course of these discussions and tours, Haight learned what she believes to be the truth about Berens' research. First, she learned from DeNardo and Brandon that Berens' research has produced little, if any, scientific results. Many of the pups died, were aborted, or were born with congenital defects, and those that were born healthy did not develop the expected subcutaneous tumors. This assessment of the project was supported by Shapiro, who told Haight that throughout the ten years that the project had been ongoing, only three pups had developed tumors, and one of those tumors was so small that it could not be seen until after the pup was killed. Second, she learned that Berens' competency to perform the complicated

surgery on the prenatal pups was questionable and that the researchers could not identify gross anatomical landmarks when attempting to inject the pups' flanks with gliomal cells. Shapiro stated that because the uterus of the beagle is murky, it became necessary to "inject everything we think we can see" when attempting to implant the cells in the pups' flanks. Third, she learned that while Berens had officially withdrawn his project from ASU, he had done so under pressure from the university's IACUC to terminate the project because of its failure to produce meaningful results after ten years of attempts. Fourth, she learned that none of the dogs temporarily housed at the VA Hospital after the project was terminated at ASU had developed subcutaneous tumors. Fifth, she discovered from Dr. Pilkington that he was surprised to have been listed as a consultant for the project and that he had not, as stated in the grant application, agreed to provide any dogs for the project.

The Relators challenge an array of allegedly fraudulent or misleading statements. The Relators' allegations are as follows:

1. Relators challenge the indications of success stated in the grant application, specifically that:

a. "successful allotolerant pups had been achieved in four separate litters";

b. "4 out of 5 pups in one litter developed tumors";

c. "one in four litters yielded at least one pup with a subcutaneous tumor";

d. "there were subcutaneous tumors in up to 80% of the pups."

2. Relators challenge the assertions in the grant application that the researchers have "achieved the technical and surgical skills necessary for realizing the desired outcome," that they can identify gross anatomical landmarks, and that the cells were embedded in the desired locations.

3. Relators challenge the projections in the grant application as to the number of tumors the researchers would create.

4. Relators challenge the statement in the grant application that "neonatal pups cannot be induced to accept allogenic cells," thus necessitating the approach taken by Berens.

5. Relators challenge the assertions in the grant application as to Pilkington's involvement as a consultant and provider of control dogs (i.e. dogs with naturally occurring brain tumors).

With respect to each allegation, the false or misleading statement was contained in the grant application obtained via Haight's FOIA request.

Before Relators filed their complaint, several news articles were published on the Berens' controversial animal experiments. *See, e.g.,* Scott Bewick, *Researcher's Beagle Testing Unnecessary, Protesters Say,* ASU STATE PRESS, Sept. 28, 2000, *available in part at* http://studentmedia.vpsa.asu.edu/webarchives/; James Hibberd, *Screwing the Pooch,* PHOENIX NEW TIMES, Jan. 4, 2001, at 14-24, *available at* http://phoenixnewtimes.com/Issues/2001-01-04/news/feature.html. In addition, In Defense of Animals issued several press and news releases relating to the Berens study. Relators argue that what they allege to be the truth about Berens' study was discovered through Haight's independent investigation.

Haight and In Defense of Animals filed their complaint on behalf of the United States under the *qui tam* provisions of the FCA in the Northern District of California. The United States declined to intervene in the action. Based on Defendants' motion, the suit was transferred to Arizona.

After transfer, the Relators filed an amended complaint, and the Defendants filed a motion to dismiss for failure to state a claim. After the motion to dismiss was denied, the Defendants filed an Answer, and the parties initiated discovery. Then the Defendants filed a second motion to dismiss, now based on lack of subject matter jurisdiction under 31 U.S.C. § 3730(e)(4). After argument the district court granted the Defendants' motion, holding that a response to a FOIA request is a public disclosure via an enumerated source and that accordingly Relators' suit was barred under 31 U.S.C. § 3730(e)(4). The district court also awarded costs to the Defendants. The Relators appeal both the district court's order granting the motion to dismiss and the order awarding costs.

We review de novo the district court's dismissal for lack of subject matter jurisdiction. *United States ex rel. Hochman v. Nackman,* 145 F.3d 1069, 1072 (9th Cir. 1998).

II.

The False Claims Act imposes liability on those who defraud the government. 31 U.S.C. § 3729. It encourages the uncovering of such fraud by permitting private persons to bring *qui tam* actions on behalf of the government. *Id.* § 3730(b); *see also United States ex rel. Campbell v. Redding Med. Ctr.,* 421 F.3d 817, 823 (9th Cir.2005) (" '[T]he Committee's overall intent in amending the qui tam

section of the False Claims Act is to encourage more private enforcement suits.'" (quoting Sen. Rep. No. 99-345, at 23-24 (1986))). Such *qui tam* relators then share in any recovery obtained on the government's behalf. 31 U.S.C. § 3730(d). At the same time, the FCA discourages opportunistic *qui tam* relators by depriving the courts of subject matter jurisdiction in actions where the fraud allegations were publicly disclosed via a source listed in the provision, unless the relator was the original source of the allegations. The jurisdictional bar provision reads:

> No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government [General] Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

Id. § 3730(e)(4)(A).

Whether an action is barred under this provision is a two-step inquiry. First, it must be determined whether the allegations were publicly disclosed via a source enumerated in § 3730(e)(4)(A). If so, then it must be determined whether the relator was the original source of those allegations. *United States ex rel. Wang v. FMC Corp.*, 975 F.2d 1412, 1416 (9th Cir.1992) ("Where there has been no 'public disclosure' within the meaning of section 3730(e)(4)(A), there is no need for a *qui tam* plaintiff to show that he is the 'original source' of the information."). "Original source" is defined in § 3730(e)(4)(B) as "an individual who has direct and independent knowledge of the information on which the allegations are based and

has voluntarily provided the information to the Government." 31 U.S.C. § 3730(e)(4)(B). Because we conclude that the allegations underlying the complaint were not publicly disclosed within the meaning of § 3730(e)(4)(A), we need not proceed to the second step.

A.

Determining whether the allegations underlying a fraud claim have been publicly disclosed under § 3730(e)(4)(A) itself requires two inquiries. First, to constitute a public disclosure, the fraud must have been disclosed in one or more[1] of the sources specified under the statute:

> 1) a criminal, civil, or administrative hearing;
>
> 2) a congressional, administrative, or [General] Accounting Office report, hearing, audit or investigation; or
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> 3) the news media.

Id. § 3730(e)(4)(A). If there has been such a disclosure, the content of that disclosure must consist of the "allegations or transactions" giving rise to Relators' claim. *A-1*

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[1] Contrary to Appellants' assertion, we assume that the elements of the fraud allegation need not have been made public in a single document. *See, e.g., United States ex rel. Found. Aiding the Elderly v. Horizon West Inc.*, 265 F.3d 1011 (9th Cir.2001), *amended by*, 275 F.3d 1189 (9th Cir.2001), *reprinted as amended*, 2001 U.S.App. LEXIS 27363, *7-11 (pin cites and subsequent citations are to the reprinted opinion) (analyzing several documents to determine whether the allegations and transactions were publicly disclosed); *A-1 Ambulance Serv., Inc. v. California*, 202 F.3d 1238 (9th Cir.2000) (finding a complaint barred by the jurisdictional provision based on the disclosures in several administrative hearings and the documents filed in conjunction with those hearings).

Ambulance Serv., 202 F.3d at 1243. "The substance of the disclosure . . . need not contain an explicit 'allegation' of fraud, so long as the material elements of the allegedly fraudulent 'transaction' are disclosed in the public domain." *Foundation Aiding the Elderly*, 265 F.3d at 1014.

> If X + Y = Z, Z represents the allegation of fraud and X and Y represent its essential elements. In order to disclose the fraudulent transaction publicly, the combination of X and Y must be revealed, from which readers or listeners may infer Z, i.e., the conclusion that fraud has been committed.

Id. at 1015 (quoting *United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 654 (D.C.Cir.1994)). In a fraud case, X and Y stand for "a misrepresented state of facts and a true state of facts." *Id.* at 1015 (internal quotation marks and citation omitted). Thus, for the suit to be barred, Defendants must show that its essential elements, both the alleged truth and the allegedly fraudulent statements, were publicly disclosed via an enumerated source.

The district court determined that the allegations underlying the fraud claim were publicly disclosed because the alleged fraud occurred in a grant application obtained by Relators pursuant to a FOIA request, and Relators' claims were disclosed in press releases and various news articles. We conclude that the district court was incorrect in holding that the response to the FOIA request was a public disclosure via an enumerated source within the meaning of § 3730(e)(4)(A). Because the misrepresented state of facts, "X," was not publicly disclosed via an enumerated source, we need not reach the questions of whether the true state of facts, "Y," was publicly disclosed

via an enumerated source or whether Relators were the "original source" of that true state of facts.

B.

Whether a response to a FOIA request is a public disclosure in a form prescribed by the jurisdictional provision is an open question in the Ninth Circuit.[2] Appellees contend that we should hold that all documents obtained via FOIA request are public disclosures for the purposes of the jurisdictional statute. In support, they cite *United States ex rel. Mistick PBT v. Housing Authority,* 186 F.3d 376, 383 (3d Cir.1999), in which the Third Circuit concluded that a response to a FOIA request is a publicly disclosed "administrative report" or "administrative investigation" so as to invoke the jurisdictional bar. *See also United States ex rel. Reagan v. E. Tex. Med. Ctr. Reg'l*

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[2] This court addressed a related question in *United States ex rel. Schumer v. Hughes Aircraft Co.,* 63 F.3d 1512, 1520 (9th Cir.1995), *vacated on other grounds,* 520 U.S. 939, 117 S.Ct. 1871, 138 L.Ed.2d 135 (1997), which the district court cited in support of its decision. *Schumer's* holding is not on point, however. *Schumer* holds only that material in a government file that is potentially accessible to the public through a FOIA request is not publicly disclosed. *Id.* at 1519-20. Only in dicta does the court discuss information that is disclosed through FOIA, saying: "In the FOIA context, information cannot be deemed disclosed until a member of the public requests the information *and receives it* from the government. Only then is the information *actually,* rather than *theoretically* or *potentially,* available to the public." *Id.* at 1520. Furthermore, *Schumer* was vacated by the Supreme Court on grounds unrelated to the public disclosure analysis. *See Hughes Aircraft Co. v. United States ex rel. Schumer,* 520 U.S. 939, 952, 117 S.Ct. 1871, 138 L.Ed.2d 135 (1997). It is thus only persuasive authority and is not binding precedent. *Orhorhaghe v. INS,* 38 F.3d 488, 493 n. 4 (9th Cir.1994). The *Schumer* opinion does not supply the answer as to whether information received through a FOIA request is publicly disclosed.

Healthcare Sys., 384 F.3d 168, 176 (5th Cir.2004); *United States ex rel. Burns v. A.D. Roe Co.*, 186 F.3d 717, 723-24 (6th Cir.1999). We disagree: a response to a FOIA request is not necessarily a report or investigation, although it can be, if it is from one of the sources enumerated in the statute. Since the document obtained via FOIA request here was not from one of the sources enumerated in the statute, the FOIA response does not trigger the jurisdictional bar.

In interpreting the jurisdictional bar, we "look first to the plain language of the statute, construing the provisions of the entire law, including its object and policy, to ascertain the intent of Congress." *United States ex rel. Lujan v. Hughes Aircraft Co.*, 243 F.3d 1181, 1187 (9th Cir.2001) (quoting *United States v. Hockings*, 129 F.3d 1069, 1071 (9th Cir.1997)). If the statutory text is ambiguous, we look to the legislative history. *Id.*

Interpreting "report" or "investigation" as listed in the jurisdictional bar to include any document obtained in response to a FOIA request would stretch the meaning of those terms too broadly. FOIA requires only that federal agencies search their records for those that are responsive to the request. 5 U.S.C. § 552(a)(3)(D) ("'[S]earch' means to review, manually or by automated means, agency records for the purpose of locating those records which are responsive to a request."). In essence, a FOIA request is a "mechanism for duplicating records that are in the possession of the federal government and that are not otherwise excludable from members of the public." *Mistick*, 186 F.3d at 393 (Becker, C.J., dissenting). In contrast, reports and investigations generally involve independent work product. "Report" denotes a document that includes an analysis of findings; "investigation" implies independent governmental

leg-work. Moreover, the FCA's jurisdictional bar groups "report" and "investigation" with a series of other enumerated sources that each involve extensive governmental work product and involvement.[3] Because responding to a FOIA request requires little more than duplication, labeling any response to a FOIA request a "report" or "investigation" would ignore the way in which each of the enumerated sources involves governmental work product.

The legislative history of the jurisdictional provisions of the False Claims Act lends support to the interpretation that a response to a FOIA request is not, standing alone, an administrative report or investigation. *See United States ex rel. Springfield Terminal Ry. Co. v. Quinn,* 14 F.3d 645, 649-51 (D.C.Cir.1994) (providing a more detailed history); *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co.,* 944 F.2d 1149, 1152-54 (3d Cir.1991) (same). The original version of the False Claims act, enacted in 1863, permitted *qui tam* suits to be filed regardless of how the relator came by the information that underlay the fraud claim, even if the government was already aware of that information. In 1943, the Supreme Court interpreted this broad statutory language to permit *qui tam* suits even when the allegations in the complaint were copied by the relator directly from criminal indictments in public court files, clearly

[3] The enumerated sources are "criminal, civil, or administrative hearing[s], . . . congressional, administrative, or Government [General] Accounting Office report[s], hearing[s], audit[s], or investigation[s], or . . . the news media." 31 U.S.C. § 3730(e)(4)(A). With the exception of the news media, each of these enumerated sources is a form of work product originating with the government. The contents of those sources is expected to be well-known to the government. Likewise, the reports of the news media can be presumed to be known by the government.

within the government's cognizance. *See United States ex rel. Marcus v. Hess,* 317 U.S. 537, 546-548, 63 S.Ct. 379, 87 L.Ed. 443 (1943). Congress responded quickly to this interpretation of the statute by swinging far in the other direction. The 1943 amendments to the FCA prohibited *qui tam* suits "based on evidence or information the Government had when the action was brought," 31 U.S.C. § 3730(b)(4) (1982) (superceded), even when that information was obtained by the relator through substantial independent effort and provided to the government in anticipation of the suit. *See, e.g., United States ex rel. Wisconsin v. Dean,* 729 F.2d 1100 (7th Cir.1984) (barring jurisdiction over a *qui tam* suit filed by the state of Wisconsin alleging Medicaid fraud the state had uncovered and reported to the federal government as required by law).

In 1986, Congress passed further amendments, acknowledging that less restrictive jurisdictional provisions were required to fight the ever-growing problem of fraud. The current language, then, was designed to create a scheme in which "the *qui tam* suit provision[s] operate somewhere between the almost unrestrained permissiveness represented by the *Marcus* decision, and the restrictiveness of the post-1943 cases, which precluded suit even by the original sources." *Stinson,* 944 F.2d at 1154 (citation omitted); *see also United States ex rel. Devlin v. California,* 84 F.3d 358, 362 (9th Cir.1996) (explaining that the 1986 amendments to the FCA represent "the golden mean between adequate incentives for whistle-blowing insiders with genuinely valuable information and discouragement of opportunistic plaintiffs who have no significant information to contribute of their own" (internal quotation marks and citation omitted)). The current provisions seek to

balance the primary fraud-detection function of the FCA while "ensur[ing] that no qui tam relator could profit from information that had become part of the public domain." *Mistick,* 186 F.3d at 391 (Becker, C.J., dissenting). Thus, the jurisdictional bar provisions "must be analyzed in the context of these twin goals of rejecting suits which the government is capable of pursuing itself, while promoting those which the government is not equipped to bring on its own." *Springfield Terminal,* 14 F.3d at 651.

Interpreting the jurisdictional provision to bar *qui tam* suits where the allegations are based on otherwise private information obtained via a FOIA request would be out of step with Congress's intentions in amending the jurisdictional provision of the FCA. In order to prevent opportunistic *qui tam* relators from profiting from information that was already part of the public domain, Congress sought to bar suits in which the government could already be expected to be on notice of the fraud. It determined that the government could be expected to be aware of information derived from the enumerated sources, because the information *originated* from the government or involved governmental work product.[4] By limiting the enumerated sources to that narrow list, however, Congress also sought to capitalize on the independent efforts of prospective *qui tam* relators who call information to the attention of the government. As stated by the D.C. Circuit:

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[4] The sole exception to this generalization about the enumerated sources is the news media. The same principle applies in this instance, however. While information in the news media does not necessarily originate from the government, it is so public that the government can be presumed to be on notice of it.

> [T]he entire *qui tam* regime is premised on the idea that the government's knowledge of misrepresented claims against the federal fisc (without knowledge that they are misrepresented) does not in itself translate into effective enforcement of the laws against fraud.

Springfield Terminal, 14 F.3d at 656. While the government can be expected to be on notice of fraud when the allegations are contained in a public disclosure such as an administrative or congressional hearing, when responding to a FOIA request, the government need not assimilate the information contained in the requested documents. The duplication of FOIA-requested documents does not require the degree of familiarity and cognizance that the drafting of a report or the conducting of an investigation would. Accordingly, prohibiting *qui tam* relators from basing their allegations on any information obtained in a FOIA response would damage the fraud-detection purpose of the FCA while failing to serve its twin goal of preventing opportunism.[5]

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[5] Moreover, holding that a FOIA response is necessarily a "report" or "investigation" would deter individuals who suspect fraud from investigating it. FOIA requests are one of the simplest vehicles by which interested citizens can uncover possible fraud against the government. If information obtained pursuant to FOIA requests could never form the basis of a *qui tam* action, prospective relators would have to invest substantially more energy into uncovering the suspected fraud through other means. Moreover, the government is not harmed by permitting claims based on information obtained pursuant to FOIA request from going forward; it still has an opportunity to intervene and take over the suit. *See* 31 U.S.C. § 3730(b)(2). Permitting claims based on otherwise private information obtained via a FOIA request to go forward also has the happy effect of encouraging private citizens with suspicions of fraud to take the most expeditious route toward uncover-

(Continued on following page)

The specific facts of this case illustrate how ill-fitting the labels of "report" or "investigation" can be for responses to FOIA requests. Haight ultimately obtained the documents 4398 that she had requested by FOIA – saliently Dr. Berens' successful grant application containing the alleged misrepresentations – by walking to Barrow and obtaining them herself. In this instance, the FOIA response consisted only of alerting Haight to the location of the documents relating to Dr. Berens' research. Far from putting any work product into those documents, in this instance the FOIA response did not even involve duplication. Responding to Haight's FOIA request did not position the government to detect or respond to the alleged fraud.

Haight, on the other hand, put in substantial time and effort into uncovering the allegations the Relators make in their complaint. In addition to filing a FOIA request, Haight requested documents, including animal care records and minutes from IACUC meetings, from Arizona State University; she toured the two facilities where dogs associated with Berens' research were housed; she contacted and interviewed at least nine people who had knowledge about the Berens' project; she also corresponded with a scientist overseas who was listed as a consultant to Berens' research. Moreover, she combed the documents that she received through her FOIA inquiry and from ASU in an attempt to learn about Berens' research. Ultimately, she uncovered what Relators allege to be serious misrepresentations about the project that resulted in an award of over $700,000 in federal funds. Relators did not behave opportunistically. To the contrary,

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ing information related to that fraud and hastening recovery for the government.

Haight performed precisely the sort of investigative work that the *qui tam* provisions of the FCA encourage in order to promote detection of fraud against the government.

We hold that whether a document obtained via FOIA request should invoke the jurisdictional bar should be determined by reference to the nature of that document itself. If the document obtained via FOIA request is a public disclosure of a "criminal, civil, or administrative hearing, . . . a congressional, administrative, or [General] Accounting Office report, hearing, audit, or investigation, or [is] from the news media," then the jurisdictional bar is applicable. If, as was the case here, the document obtained via FOIA does not *itself* qualify as an enumerated source, its disclosure in response to the FOIA request does not make it so.

In the present case, the allegations and transactions in the complaint were based on information found solely in the grant application Haight obtained in response to the FOIA request. Because the grant application was not publicly disclosed via an enumerated source, Relators' suit is not barred by § 3730(e)(4)(A).

C.

Because we hold that the misrepresented state of facts, "X," was not publicly disclosed via an enumerated source, we need not, and do not, reach the questions of whether the true state of facts, "Y," was publicly disclosed via an enumerated source, or whether Relators were the "original source" of that true state of facts.

III.

We **REVERSE** and **REMAND.**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

United States of America, ex rel. Patricia Haight and In Defense of Animals, Plaintiff, vs. Catholic Healthcare West, et al., Defendants.	No. CV-01-2253-PHX-FJM **ORDER** (Filed Sep. 3, 2003)

The court has before it Defendants' motion to dismiss for lack of subject matter jurisdiction (doc. 78), Plaintiff's response, and Defendants' reply. Plaintiff brings this *qui tam* action under the False Claims Act ("FCA"), 31 U.S.C. §§ 3729-3733. Plaintiff alleges that Defendants knowingly made false and misleading statements in their grant application, and thus, fraudulently received research funding from the federal government. Defendants move to dismiss under the FCA's "public disclosure" jurisdictional bar.

The FCA expressly limits a court's jurisdiction over *qui tam* claims that are

> based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action [the "relator"] is an original source of the information.

31 U.S.C. § 3730(e)(4)(A). The bar furthers the FCA's purpose because, when the information underlying the relator's complaint has already been publicly disclosed, the government receives no additional benefit from the relator's filing a *qui tam* suit. The FCA's public disclosure bar involves a two part test. A court must first determine if there has been a public disclosure of the allegations or transactions upon which the FCA action is based. If yes, a court must then determine whether the relator is an original source within the meaning of the FCA. The relator bears the burden of establishing by a preponderance of the evidence that the jurisdictional bar does not apply and the court has subject matter jurisdiction.

To constitute a "public disclosure" within the meaning of the FCA the disclosure must have been through a method specified in the statute. Here, Defendants argue that the public disclosure bar applies because Plaintiff's allegations are based upon information obtained pursuant to a Freedom of Information Act ("FOIA") request and news media articles. The FCA specifically lists administrative reports and news media reports as sources of pub[l]ic disclosures. Information released in response to a FOIA request constitutes an administrative report and is, therefore, a public disclosure within the meaning of the FCA. *United States, ex rel. Schumer v. Hughes Aircraft Co.*, 63 F.3d 1512, 1520 (9th Cir. 1995); *see also United States, ex rel. Mistick PBT v. Housing Auth. of the City of Pittsburgh*, 186 F.3d 376, 383 (3d Cir. 1999). Allegations reported in the news media are also publicly disclosed for purposes of the FCA.

An FCA claim is based upon a public disclosure if it is substantially similar to or supported by the allegations or transactions described in the public disclosure. *United*

States, ex rel. Biddle v. Bd. of Tr. of Stanford Univ., 161 F.3d 533, 536-37 (9th Cir. 1998). Plaintiff alleges that Defendants defrauded the government because they overstated their success rate in their grant application. The allegations of fraud are, at least in part, based on information contained in the grant application, which Plaintiff obtained pursuant to a FOIA request. Furthermore, the news articles describe the Defendants' research and alleged failure rate and are substantially similar to Plaintiff's allegations. Both the FOIA requests and the news media articles predate Plaintiff's FCA claims. These claims, therefore, are "based upon" publicly disclosed information within the meaning of the FCA.

Plaintiff argues that her FCA claims are not based upon public disclosures because she was the source of the news articles, and the publication of the allegations or transactions in the news stories cannot therefore serve to bar this suit. The Ninth Circuit has squarely rejected this theory. *United States, ex rel. Aflatooni v. Kitsap Physicians Svcs.*, 163 F.3d 561, 521-22 (9th Cir. 1998). Plaintiff also argues that the disclosures do not trigger the jurisdictional bar because no single disclosure contained all of the allegations of fraud. The issue, however, is whether the critical elements of the fraudulent transaction are in the public domain, not whether they are neatly collected in a single publicly disclosed document. Here, the allegedly misrepresented facts were publicly disclosed in the grant application through the FOIA process and the allegedly true facts were disclosed in the news media. Therefore, all of the material elements of Plaintiff's FCA claim were in the public domain.

Having determined that Plaintiff's FCA claim is based upon publicly disclosed allegations, the final question is

whether the court nonetheless has subject matter jurisdiction because Plaintiff was an original source of the disclosures. The FCA defines an original source as "an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing [a *qui tam*] action." 31 U.S.C. § 3730(e)(4)(B) . In order to qualify as an original source, the relator must have both direct and independent knowledge of the information upon which her allegations are based. A relator's information is independently obtained when it is acquired prior to the public disclosure of the allegations. A relator has direct knowledge if it is discovered firsthand. In other words, a relator has direct knowledge only if she saw the fraud with her own eyes or obtained her knowledge of it through her own labor unmediated by anything else. *United States, ex rel. Delvin v. State of Calif.*, 84 F.3d 358, 361 (9th Cir. 1996).

Here, Plaintiff's knowledge is not independent because it is based, at least in part, on information contained in the grant application. Furthermore, Plaintiff obtained her knowledge of the alleged research failure second hand. She had no involvement with Defendants' research, nor did she witness any of the research procedures or laboratory results. Plaintiff's allegations are based solely on information gathered from third parties. Plaintiff has failed to provide persuasive authority in support of her argument that her investigative efforts and discussions with project participants render her an original source within the meaning of the FCA.

Plaintiff's FCA claims are based upon information that has been publicly disclosed as defined by the FCA.

Furthermore, Plaintiff has failed to establish that she is an original source of the publicly disclosed information.

Accordingly,

IT IS ORDERED GRANTING Defendants' motion to dismiss for lack of subject matter jurisdiction (doc. 78).

DATED this 29 day of August, 2003.

/s/ Frederick J. Martone
Frederick J. Martone
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff, and PATRICIA HAIGHT, ex rel and in Defense of Animals, Plaintiff-Appellant, v. CATHOLIC HEALTHCARE WEST; et al., Defendants-Appellees.	No. 03-16937 D.C. No. CV-01-02253-FJM District of Arizona, Phoenix ORDER (Filed May 30, 2006)

Before: B. FLETCHER, GIBSON,* and BERZON, Circuit Judges.

Judge Berzon votes to deny the petition for rehearing en banc and Judges B. Fletcher and Gibson so recommend.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing en banc is denied.

* The Honorable John R. Gibson, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.

No. 06-282

IN THE

Supreme Court of the United States

CATHOLIC HEALTHCARE WEST;
CATHOLIC HEALTHCARE WEST ARIZONA,
and MICHAEL BERENS,

Petitioners,

v.

UNITED STATES OF AMERICA *ex rel.* PATRICIA
HAIGHT and IN DEFENSE OF ANIMALS,

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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November 2006

QUESTIONS PRESENTED

1. Whether release of documents to a *qui tam* relator pursuant to the Freedom of Information Act ("FOIA") was a "public disclosure" within the meaning of the False Claims Act statutory bar of parasitic *qui tam* actions, 31 U.S.C. §3730(e)(4)(A), when neither the relator nor the agency disclosed the documents to the general public.

2. Whether release of documents to relator pursuant to FOIA constituted a disclosure in one of the specified fora of §3730(e)(4)(A) – in this case in a federal administrative investigation or report.

PARTIES

Qui tam respondents are Patricia Haight and In Defense of Animals, who bring the underlying action in the name of, and on behalf of, the United States of American. Petitioners are Catholic Healthcare West, Catholic Healthcare West Arizona, and Michael Berens.

RULE 29.6 STATEMENT

In Defense of Animals is a not-for-profit entity. It has no parent corporation or publicly held company owning ten percent or more of its stock.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES ii

RULE 29.6 STATEMENT ii

INTRODUCTION 1

STATEMENT OF THE CASE 2

REASONS FOR DENYING THE WRIT 10

A. REVIEW IS NOT NEEDED TO ADDRESS THE SHALLOW DISAGREEMENT IDENTIFIED IN THE PETITION 11

B. ON THE FACTS OF THIS CASE, REVIEW OF THE DECISION BELOW DOES NOT PRESENT A QUESTION OF IMPORTANCE TO THE STATUTORY BAR 13

C. MULTIPLE LEGAL AND FACTUAL ISSUES COMPLICATE THIS CASE MAKING IT LESS INVITING AS A VEHICLE FOR REVIEW 14

D. THE DECISION BELOW WAS CORRECT 16

E. THE COURT SHOULD NOT HOLD THIS CASE UNTIL RESOLUTION OF *ROCKWELL* 17

CONCLUSION 18

TABLE OF AUTHORITIES

Cases

Chevron U.S.A. Inc. v. Natural Resources Defense Council,
467 U.S. 837 (1984) 14

Consumer Product Safety Comm'n v. GTE Sylvania,
447 U.S. 102 (1980) 11

Pettis ex rel. United States v. Morrison-Knudsen Co.,
577 F.2d 668 (9th Cir. 1978) 2

United States ex rel. Fallon v. Accudyne Corp.,
97 F.3d 937 (7th Cir. 1996) 2

United States ex rel. Feingold v. Administar Federal, Inc.,
324 F.3d 491 (7th Cir. 2003) 2

United States ex rel. Marcus v. Hess,
317 U.S. 537 (1943) 2, 4, 5, 13

United States ex rel. Mistick PBT v. Housing Authority,
186 F.3d 376 (3rd Cir. 1999) 1, 10-13

United States ex rel. Reagan v. East Texas Medical Center,
384 F.3d 168 (5th Cir. 2004) 12

United States ex rel. Schumer v. Hughes Aircraft Co.,
63 F.3d 1512 (9th Cir. 1995), *vacated on other grounds*,
520 U.S. 939 (1997). 4

United States ex rel. State of Wisconsin v. Dean,
729 F.2d 1100 (7th Cir. 1984) 2, 4

United States v. Solinger, 2006 U.S. Dist. LEXIS 75063 (W.D. Ky. 2006) 13

Wang v. FMC Corp., 975 F.2d 1412 (9th Cir. 1992) 3

Statutes

31 U.S.C. §1331 2

31 U.S.C. §1345 2

31 U.S.C. §232(C) (former law) 2

31 U.S.C. §2732(a) 2

31 U.S.C. §3729 5

31 U.S.C. §3730(b) 5

31 U.S.C. §3730(e)(4) 1, 2, 13, 14, 16

False Claims Act, former 31 U.S.C. §232(C) 2

Other

S. Rep. No. 345, 99th Cong., 2d Sess. 24-26 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5289-91 3

INTRODUCTION

This case involves the statutory bar of the False Claims Act ("FCA"), which was designed to prohibit parasitic *qui tam* actions. As defined in the 1986 FCA amendments, 31 U.S.C. §3730(e)(4), a parasitic *qui tam* action is one which is based upon the public disclosure of the allegations of false claims in one of the statutorily-specified fora, unless the United States government intervenes or the relator is "an original source" of the information upon which the allegations are based.

Below, the court held the parasitic *qui tam* bar did not apply to this case. It found that release of a fraudulent National Institutes of Health grant application to relator did not constitute a federal administrative "investigation" or "report" – two of the possible specified fora of §3730(e)(4) – and that therefore, on the facts of this case, the release did not trigger the statutory bar. Petitioners claim the Ninth Circuit's judgment conflicts with the majority opinion in *United States ex rel. Mistick PBT v. Housing Authority*, 186 F.3d 376 (3rd Cir. 1999), which was written by Justice (then-Judge) Alito.

While there is a potential disagreement over one issue decided below and in the majority opinion in *Mistick*, there is hardly a deep conflict in the circuits. Both the Ninth Circuit and the Third Circuit held that a FOIA production was a "public disclosure" and could constitute one of the specified fora. The only real difference between the two opinions concerns whether a FOIA production must always constitute disclosure in a specified forum. Given the facts of this particular case – where the relator was simply told by the agency that she could go down to the defendants' hospital and receive a copy of the grant application – the finding that there was no administrative investigation or report is hardly controversial, and is completely unworthy of review.

STATEMENT OF THE CASE

1. As originally enacted in 1863, the *qui tam* provisions of the FCA had no limitation on who could serve as relator. In response to the 1943 the Supreme Court case of *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943), Congress amended the statute to introduce the first statutory bar of parasitic actions.[1] In its first version, the bar prohibited actions when the government already knew of the information upon which the lawsuit was based. *See* former 31 U.S.C. §232(C) (1943) (precluding actions that were "based on evidence or information in possession of the United States, or any agency, officer or employee thereof, at the time such suit was brought").

The problem with the 1943 "government knowledge" bar was that it went too far, foreclosing operation of the important *qui tam* enforcement provisions. Even when the government had such information, officials might determine for lack of resources or political will not to seek remedies. Moreover, in applying the 1943 law, courts relied upon the "government knowledge" bar even when it was clear the action not a "parasitic" – for example when the government conducted its investigation of fraud as a result of the disclosures of the relator *See, e.g., United States ex rel. State of Wisconsin v. Dean*, 729 F.2d 1100, 1104 (7th Cir. 1984) (Wisconsin not

---

[1]Although petitioners claim the statutory bar effects "subject matter jurisdiction," courts which have looked at the issue hold it is not a true jurisdictional statute. Subject matter jurisdiction is conferred by §§1331, 1345 and 2732(a); §3730(e)(4) effects the substantive rights of the parties. *See United States ex rel. Feingold v. Administar Federal, Inc.*, 324 F.3d 491, 494-95 (7th Cir. 2003); *United States ex rel. Fallon v. Accudyne Corp.*, 97 F.3d 937, 940-41 (7th Cir. 1996).

permitted to maintain *qui tam* suit because the federal government already had learned of the information when the state reported it).

In 1986, in the midst of increasing concern over fraud, Congress amended the FCA's prohibition of parasitic suits. In the 1986 version, Congress sought to overturn the federal courts' "severely restrictive interpretations." *Wang v. FMC Corp.*, 975 F.2d 1412, 1419 (9th Cir. 1992). Importantly, the 1986 amendments fundamentally altered the underlying assumption of the 1943 law: that the *qui tam* provisions were designed to assist the government only when it did not know of the fraud. It also dispensed with the idea that, in order to be a true relator, the *qui tam* plaintiff must bring new information of the fraud to the government. The 1986 *qui tam* provisions eliminated the "government knowledge" bar, and put in its place another bar which expressly authorized relators to enforce the FCA, even in those cases where the government knows of the fraud and chooses not to pursue it, and even when the relator adds to the mix no new information on the fraud.

> [I]n passing the 1986 amendments, Congress specifically sought to diminish the government's ability "to sit on, and possibly suppress, allegations of fraud when inaction might seem to be in the interest of the government." ... S. Rep. No. 345, 99th Cong., 2d Sess. 24-26 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5289-91. The 1986 amendments also reflected Congress's recognition that the government simply lacks the resources to prosecute all viable claims, even when it knows of fraudulent conduct.

United States ex rel. Schumer v. Hughes Aircraft Co., 63 F.3d 1512, 1519 (9th Cir. 1995) (citation omitted), *vacated on other grounds*, 520 U.S. 939 (1997).

Thus, the1986 FCA amendments crafted a narrow rule designed to exclude only truly parasitic *qui tam* actions. It did this by expressly limiting the circumstances when the bar could be invoked to those actions like *Marcus v. Hess* – where the public disclosure of a government investigation proves to be the basis for the relator's allegations. And to protect any *qui tam* relator who was "an original source" of information to the government, such as in *Wisconsin v. Dean*, Congress created an exception to the bar for any relator that was on "original source."

That Congress had *Marcus v. Hess* in mind when it amended the bar in 1986 is made clear by the fact that *each* of the four elements in *Hess* was made an express requirements:

> (1) The action must be "based upon" the disclosure; as occurred in *Hess* when the relator derived his knowledge from the filing of the criminal indictment.
>
> (2) The disclosure must be "public"; as occurred in *Hess* when the criminal indictment was placed in the court's open files.
>
> (3) The content of the disclosure must be of the "allegations or transactions" of the fraud or false claims; as occurred in *Hess* when the information in the indictment expressly stated the fraud.
>
> (4) The medium of the disclosure must be one of the specified fora; as occurred in *Hess* when a pleading was filed in connection with a federal investigation and criminal hearing.

2. Respondents-relators are Dr. Patricia Haight and In Defense of Animals, an animal welfare advocacy organization where Dr. Haight serves as Southwest Regional Director. Petitioners-defendants are Dr. Michael Berens and the private research institutions that employ him. In their *qui tam* action, filed under §3730(b), relators alleged that defendants submitted a false and fraudulent grant application to NIH in order to secure federal funds in violation of §3729 of the FCA.

Beginning in 1990, defendants conducted a research project involving pregnant beagles. The project was conducted under the supervision of the Institutional Animal Care and Use Committee ("IACUC") at Arizona State University ("ASU"). It was privately funded until 1998, when NIH awarded a grant.

Defendants' stated purpose for the project was to create a canine model of a glioma (brain tumor) using beagle puppies. This was supposed to be accomplished by first surgically injecting fetal puppies in the flank of the leg with glioma tumor cells, while they gestated in the dam's uterus. When the puppies became four to six months old, the intent was to remove the subcutaneous glioma tumors that developed and implant them into the brain of the same animals.

Between the years 1990 and 1997, the project had an abysmal record. In those seven years, less than a handful of tumors were created, and of those only two were successfully transplanted to the brain. In addition, almost half of the litters aborted, and many of the pups were born with congenital defects or died shortly after birth. Dr. Berens' surgical technique used to label prenatal pups according to the protocol exacerbated these problem, forcing him to forego labeling to the complete demise of his project. Overall, it had a failure rate of more than 95%.

In October 1997, Dr. Berens made what his second grant application seeking NIH funding. NIH requires the principal investigator to provide detailed information about proposed research to expert peer reviewers, who in turn evaluate and prioritize various projects in competition for limited NIH funds. None of the information about the failure of the project was included in the NIH grant application. Instead, defendants made false and misleading statements, and they omitted material information, to deceive the reviewers and obtain federal funds.

In their *qui tam* action, relators alleged that defendants:

> (1) falsely stated they had achieved a tumor take rate of up to 80%, knowing they had been profoundly unsuccessful, with at best a 5% tumor take rate and a total of only two tumors after 7 years of research and 33 fetal implant surgeries;
>
> (2) falsely represented they had achieved the technical and surgical skills necessary to perform the surgery;
>
> (3) falsely represented the number of tumors that researchers would create under the grant, unrealistically projecting a factorial design of 80 tumors in 80 pups coming from 18 fetal implant surgeries in 18 dams;
>
> (4) made other false statements in the grant application, including false representations of about the commitments of the purported collaborator, Dr. Geoffrey Pilkington; and false justifications about the need for experimenting on prenatal pups.

3. There is no dispute that relators based their *qui tam* action on their own extensive investigation into the conduct of defendants' research project. Part of that investigation included obtaining a copy of the NIH grant application through a request under the FOIA. But the grant application contained only the false representations defendants made to NIH, not the information showing those representations to be false. Dr. Haight derived her knowledge of their falsity through her own direct and independent investigation.

Dr. Haight testified she based her "allegations of false and misleading statements in defendants' NIH grant application on information and belief formed after [her] own independent investigation into Dr. Berens' research project." Relator did the work of the investigation herself; she gathered, reviewed and synthesized primary records from NIH, Arizona State University, the Southern Arizona VA Hospital and a private accrediting agency. She also conducted her own interviews, private conversations and correspondence with veterinarians, consultants, employees and staff who worked with the subject dogs, including defendants' own representatives.

Although she began her investigation at the request of one of her students and others who were protesting the animal research, no one person or group of people told her the scientists had lied to NIH or had otherwise defrauded federal funds. Because the records themselves were innocuous, she had to "bridge the gap" and discover the false statements. Her allegations were formed independently after she herself reviewed the information gained through her own investigatory efforts.

4. Throughout her pre-filing investigation, Dr. Haight learned no information about defendants' research project through any governmental hearing, investigation, audit or report. Dr. Haight testified without contradiction that no

documents disclosed, referred or even related to a governmental report or investigation.

In fact, NIH never conducted an investigation or report on defendants' research project, either in connection with the grant or Dr. Haight's FOIA request. The totality of NIH's efforts in response to relator's FOIA request was to inform her, after some delays, that she could go to St. Joseph Hospital herself and obtain a copy of the NIH grant application. No evidence exists that NIH ever reviewed the grant application in connection with the FOIA request. Nor is there any evidence that NIH disclosed a report on Dr. Haight's request.

Below, the Ninth Circuit found these facts to be determinative:

> The specific facts of this case illustrate how ill-fitting the labels of "report" or "investigation" can be for responses to FOIA requests. Haight ultimately obtained the documents that she had requested by FOIA – saliently Dr. Berens' successful grant application containing the alleged misrepresentations – by walking to Barrow and obtaining them herself. In this instance, the FOIA response consisted only of alerting Haight to the location of the documents relating to Dr. Berens' research. Far from putting any work product into those documents, in this instance the FOIA response did not even involve duplication. Responding to Haight's FOIA request did not position the government to detect or respond to the alleged fraud.

Haight, on the other hand, put in substantial time and effort into uncovering the allegations the Relators make in their complaint. In addition to filing a FOIA request, Haight requested documents, including animal care records and minutes from IACUC meetings, from Arizona State University; she toured the two facilities where dogs associated with Berens' research were housed; she contacted and interviewed at least nine people who had knowledge about the Berens' project; she also corresponded with a scientist overseas who was listed as a consultant to Berens' research. Moreover, she combed the documents that she received through her FOIA inquiry and from ASU in an attempt to learn about Berens' research. Ultimately, she uncovered what Relators allege to be serious misrepresentations about the project that resulted in an award of over $700,000 in federal funds. Relators did not behave opportunistically. To the contrary, Haight performed precisely the sort of investigative work that the qui tam provisions of the FCA encourage in order to promote detection of fraud against the government. (App. 17-18.)

REASONS FOR DENYING THE WRIT

Difference in opinion on whether a response to a FOIA request always constitutes a federal administrative investigation or report – thus triggering the statutory bar of parasitic *qui tam* actions – is more like a shallow crevice than a direct circuit split. Both the Ninth Circuit here and the Third Circuit in *United States ex rel. Mistick PBT v. Housing Authority*, 186 F.3d 376 (3rd Cir. 1999), held a FOIA production was a "public disclosure" and could trip the statutory bar if documents produced include an agency investigation or report. Because of the unique facts in this case that NIH made no investigation or report on defendants' research project, the Ninth Circuit's judgment that the bar was not invoked presents no important question worthy of review.

Moreover, the single question presented by the petition is complicated by other legal and factual issues: whether FOIA production to the relator alone constitutes "public" disclosure; whether disclosure must be in a single forum; whether the action is "based upon" the disclosure; whether there was disclosure of "allegations or transactions" of the fraud; and whether Dr. Haight qualifies as an original source. The presence of these numerous intertwined questions – two of which were not addressed by the court below – make this case a poor vehicle for review of the question presented by petitoners.

Finally, respondents urge the Court not to hold this petition for resolution until after disposition of *Rockwell Intern'l v. United States ex rel. Stone*, Case No. 05-1272, which is currently being briefed on the merits. *Rockwell* will be resolved on (1) whether the statutory bar of parasitic *qui tam* actions applies when the government intervenes, and (2) whether relator Stone qualifies as an "original source." Neither question was addressed below and neither is raised by the petition.

A. REVIEW IS NOT NEEDED TO ADDRESS THE SHALLOW DISAGREEMENT IDENTIFIED IN THE PETITION

Petitioners overstate the disagreement between the Ninth Circuit in *Haight* and the Third Circuit in *Mistick* when they suggest a "direct and genuine" split between the circuits. In *Mistick*, the Court held a response by the Department of Housing and Urban Development ("HUD") to a FOIA request was a "public disclosure" triggering the bar of parasitic actions. 186 F.3d at 383-85. But whatever disagreement exists between these two circuit court opinions, it does not run very deep.

Both circuit opinions held a response to a FOIA request was "public." In *Mistick*, the Third Circuit rested its analysis on FOIA's express purpose of making certain categories of information "available to the public," as well as on this Court's use of the term "public" in *Consumer Product Safety Comm'n v. GTE Sylvania*, 447 U.S. 102, 108-09 (1980). *See Mistick*, 186 F.3d at 383. In *Haight*, the court essentially agreed: Addressing whether the FOIA response triggers the bar, the Ninth Circuit held that it could, if the other statutory requirements are satisfied. App. 12.

Both *Mistick* and *Haight* also held that disclosure must be in one of the statutorily specified fora – a civil, criminal or administrative hearing; a federal investigation, audit or report; or from the news media. *See Mistick*, 186 F.3d at 383 ("Thus, in order to fall within this language, a disclosure (1) must be 'public' and (2) must occur in one of the specified contexts.") And both agree that this statutory list is exhaustive.

Where the disagreement lies is a narrow question: whether response to a FOIA request must *always* trigger the statutory bar. In *Mistick*, the Third Circuit broadly stated its holding that HUD's response constituted an administrative

report and investigation because, under FOIA, the agency was obligated to make a detailed examination and search for relevant information to notify the requester of the results of its investigation and deliver the information sought. *Mistick*, 186 F.3d at 384. Read broadly – as urged by petitioner in this case – the majority opinion in *Mistick* would mean that the statutory bar of parasitic lawsuits triggers in every instance when a federal agency makes a response under FOIA.

In *Haight*, the court disagreed with the broad statement of the rul . In the opinion of the panel – which included Hon. John R. Gibson, Senior United States Circuit Judge for the Eight Circuit, sitting by designation – the response to the FOIA request did not constitute an administrative report or investigation, because NIH simply informed relator where to receive a copy of the grant. "Interpreting 'report' or 'investigation' as listed in the jurisdictional bar to include any document obtained in response to a FOIA request would stretch the meaning of those terms too broadly." App. 12.

This crevice between the two circuit opinions does not require this Court's resolution. Indeed, these are only the first two circuits to address the issue head-on.[2] Lower courts have no difficulty applying the statutory bar with guidance from both decisions. *See, e.g., United States v. Solinger*, 2006 U.S. Dist. LEXIS 75063 (W.D. Ky. 2006) (discussing both *Mistick* and *Haight* to resolve the question of whether the FOIA response in that case triggered the statutory bar).

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[2]In *United States ex rel. Reagan v. East Texas Medical Center*, 384 F.3d 168, 175-176 (5th Cir. 2004), the court agreed with *Mistick*, but there were other public disclosures unrelated to the FOIA request, including a state court action and multiple administrative investigations into the allegations of fraud.

B. ON THE FACTS OF THIS CASE, REVIEW OF THE DECISION BELOW DOES NOT PRESENT A QUESTION OF IMPORTANCE TO THE STATUTORY BAR

On the narrow question of whether a response to a FOIA request by a relator must always trigger the statutory bar, the facts here do not raise any important concerns of law. Lying beneath the statutory bar is an intent by Congress to prohibit parasitic lawsuits, *i.e.*, those involving an opportunistic relator, like Marcus in *Hess*, who derives knowledge of the allegations of fraud by riding the investigational coattails of the government. In this case, since NIH conducted no investigation and issued no report into defendants' research project – either at the time of the grant application or, later, at the time of Dr. Haight's FOIA request – nothing indicates that Dr. Haight's action was parasitic. Indeed, the only thing NIH did in response under FOIA was inform Dr. Haight to receive a copy of the grant application directly from defendants.

As such, the facts of this case do not implicate the important concerns behind §3730(e)(4). While an agency's response to a relator's FOIA request might, under appropriate circumstances, provide a relator with the government's own investigation of fraud, those facts are not present here. Simply put, this case does not provide a sound basis for testing the limits of the meaning of administrative "report" or "investigation" as two of the specified fora of the FCA bar.

In the petition, defendants claim the court adopted a "knowledge standard" that is inconsistent with decisions from other circuits. This argument too is misdirected. First, the Ninth Circuit adopted no such "knowledge standard," and none exists under the current version of the FCA statutory bar. While the 1943 version prohibited *qui tam* actions based upon

information and evidence already known to the government, Congress expressly amended that provision in 1986 to substitute the current version. Consistent with those amendments, the court in *Haight* did not restrict the statutory bar to only those cases where the government was "on notice of the fraud." Petitioner's suggestion to the contrary (Petition, at 11, citing to Appendix at 15) is erroneous. Instead, the court discussed its interpretation of legislative purpose, given its peculiar history, to explain why Congress limited application of the bar to the specified fora of §3730(e)(4)(A).

It is the court's judgment that would be reviewed here, not expressed opinions on legislative purposes. In other words, the panel's discussion of FCA purposes does not provide a reason for granting the writ. *See Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842 (1984) (Court reviews judgments, not opinions).

C. MULTIPLE LEGAL AND FACTUAL ISSUES COMPLICATE THIS CASE MAKING IT LESS INVITING AS A VEHICLE FOR REVIEW

Resolving whether NIH conducted an investigation or report as a result of Dr. Haight's FOIA request is only one question of many at play in this case. Persistence of other issues will either unnecessarily complicate the resolution of the question presented or foreclose ultimate resolution of the case.

Petitioners' statement of the single question is actually a presentation of three separate questions. Whether a response to the FOIA request is a public disclosure under the FCA really asks: (1) was the disclosure "public," (2) was it in a specified forum, and (3) was it contained within a single forum? Although the Ninth Circuit resolved in relators' favor the second issue – whether disclosure was made in one of the specified fora – it assumed that it would resolve the other two issues against

them. *See* App. 9 n.1; 12. If the writ is granted in this case, this Court will be asked to look beyond those assumptions and determine (1) whether a disclosure to the relator is a disclosure that is "public," when neither the agency nor the relator discloses to the general public; and (2) whether "transactions" of fraud must be disclosed in a single forum.[3]

Similarly, even if all three of these issues were resolved against relators, resolution of the case would remain open on the question of whether relators derived their knowledge of the falsity of representations from the grant application itself. Even if the FOIA response constituted a public disclosure, no statutory bar would be invoked unless the *qui tam* action was "based upon" that public disclosure. In the conditional cross-petition, relators request the Court review that issue as well, but only in the event that the underlying writ of certiorari is granted. Although it would need to be addressed, the presence of the

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[3]Whether disclosure must be in a single forum is raised in this case because of the presence of news articles on Dr. Beren's research. In the media coverage, Dr. Haight disclosed her criticism of defendants' handling of animal welfare by defendants' researchers. None of these articles contained any allegation of fraud on the NIH grant application or in any way suggested misrepresentations by defendants to the government. Defendants nevertheless attempted to piece together an argument for disclosure of the "transactions of fraud" by combining the disclosures through FOIA with information contained in the media. Since it is admitted that neither the NIH grant application, nor the media articles, in themselves, disclosed the essential elements of the fraudulent transactions, neither one alone and the two combined should not invoke the bar of parasitic *qui tam* lawsuits.

"based upon" question complicates this case and makes it a significantly less practicable case for review.

Moreover, two issues connected to the statutory bar in this case were not addressed at all by the Ninth Circuit. First, the Ninth Circuit did not determine whether the true state of facts was publicly disclosed via an enumerated source, and second, the Court did not address the parties' contentions about "original source" status. App. 10-11. While neither question is properly presented on the petition, both operate to foreclose resolution of the statutory bar's application in this case.

In sum, the single question presented by the petition is complicated by the presence of these other legal and factual issues. Some of the issues have not developed in the case law, but should properly be addressed by the Court in the event the writ is granted. Other issues would foreclose resolution of the case, but because they are not properly before the Court, they should remain open. Even if petitioner's single question was important for the uniform operation of the statutory FCA bar, this case is a poor vehicle for the Court to address it.

D. THE DECISION BELOW IS CORRECT

A writ should be denied in this case because the court was correct in its judgment that the statutory bar in §3730(e)(4) is not invoked. That FCA statutory bar is designed to foreclose parasitic *qui tam* actions, when the relator derives knowledge of fraud based upon the public disclosure of allegations in the government's own work-product (or the news media). Moreover, in enacting the bar, Congress created an exception for parasitic actions that are brought by a relator who was an original source of information to the government. On the facts of this case, it is clear that relators' action is not parasitic, and thus the court's decision below was correct.

There is no dispute Dr. Haight predicated allegations of fraud on the fruits of her own investigatory labor. Although she obtained a copy of the NIH grant application through FOIA, no document revealed any investigation or audit of the research project. Not surprising, the grant application did not reveal itself to be full of misrepresentations. Only through Dr. Haight's persistent and thorough investigation was the allegations of fraud uncovered. As the decision below recognized, Congress intended relators to be effective in ferreting out fraud and waste, and it did not want to hamstring relators and keep them from conducting a pre-filing investigation to aid in the recovery of federal funds. Using FOIA as part of the relators' investigation should be encouraged. Had the court held that every FOIA request triggers the bar, would-be relators would be enticed to file actions before completing adequate investigations. No purpose of Congress would be served by such a rule. Indeed, the decision below properly protects the congressional purpose of encouraging the uncovering of fraud while barring only truly parasitic *qui tam* actions.

E. THE COURT SHOULD NOT HOLD THIS CASE UNTIL RESOLUTION OF *ROCKWELL*

Respondents are aware of this Court's grant of certiorari in *Rockwell Intern'l v. United States ex rel. Stone*, Case No. 05-1272, which is currently being briefed on the merits and set for argument in December. However, *Rockwell* does not present any issue which could effect the Ninth Circuit's disposition in *Haight*. *Rockwell* involves (1) application of the statutory bar when the government intervenes, and (2) the definition of "original source." Neither issue is presented on this petition. At this point, the government has not intervened in the case. Moreover, while relator qualifies as an original source, the Ninth Circuit did not need to address that question, and it expressly left it unresolved. App. 10-11.

Although the parties had prepared this case for trial through the close of discovery, it has already been put on hold ever since the district court ruled on the statutory bar. The district court's delayed ruling on the motion issued September 2003. Appellate briefing in the Ninth Circuit began in March 2004. After the matter was fully briefed, hearing in the Ninth Circuit was delayed until September 2005, and the decision was not issued until April 2006. If the Court holds the petition here until after resolution of *Rockwell*, relators would not return to the district court until well into 2007 or even 2008.

Only the fact that both cases involve the statutory prohibition of parasitic *qui tam* actions relates *Haight* to *Rockwell*. No statement of the law on the issues presented in *Rockwell* could have any direct bearing on this case. Moreover, even if the law were to change, the district court will continue to have jurisdiction over the case and will be able to apply any retroactive changes resulting from *Rockwell*. Respondents therefore request that no hold be placed in this case in light of the pendency of the other action.

CONCLUSION

The petition for a writ of certiorari should be denied

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No. 06-282

In The
Supreme Court of the United States

CATHOLIC HEALTHCARE WEST,
CATHOLIC HEALTHCARE WEST ARIZONA,
and MICHAEL BERENS,

Petitioners,

v.

UNITED STATES OF AMERICA ex rel.
PATRICIA HAIGHT and IN DEFENSE OF ANIMALS,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF FOR THE PETITIONERS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

REPLY BRIEF FOR THE PETITIONERS 1

CONCLUSION 7

TABLE OF AUTHORITIES

Page

CASES

Archer v. Warner, 538 U.S. 314 (2003) 4

Chevron U.S.A. Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984) 2

Cooper v. Blue Cross & Blue Shield, 19 F.3d 562 (11th Cir. 1994) 6

Hagood v. Sonoma County Water Agency, 81 F.3d 1465 (9th Cir. 1996) 6

Hughes Aircraft Co. v. United States ex rel. Schumer, 520 U.S. 939 (1997) 3

United States ex rel. Grynberg v. Praxair, Inc., 389 F.3d 1038 (10th Cir. 2004) 3

United States ex rel. Mistick PBT v. Housing Auth., 186 F.3d 376 (3d Cir. 1999) 1, 2, 5

United States ex rel. Precision Co. v. Koch Indus., Inc., 971 F.2d 548 (10th Cir. 1992) 6

United States ex rel. Reagan v. E. Texas Med. Ctr. Reg'l Healthcare Sys., 384 F.3d 168 (5th Cir. 2004) 1, 5

United States v. Solinger, ___ F. Supp. 2d ___, 2006 WL 2927509 (W.D. Ky. Oct. 12, 2006) 2

Walburn v. Lockheed Martin Corp., 431 F.3d 966 (6th Cir. 2005) 3

West v. Gibson, 527 U.S. 212 (1999) 4

DOCKETED CASE

Rockwell International Corp. v. United States ex rel. Stone, No. 05-1272 ..... 5, 6, 7

TABLE OF AUTHORITIES – Continued

Page

STATUTE AND RULE

31 U.S.C. § 3730(e)(4) 1, 3, 6

Supreme Court Rule 14.1 4

REPLY BRIEF FOR THE PETITIONERS

1. Respondents contend that the issue on which the circuits are divided is "narrow." BIO 11-12. That is incorrect. The Third and Fifth Circuits have held that any document produced pursuant to FOIA necessarily satisfies the statutory "public disclosure" requirement, because a FOIA request results in both an "administrative . . . report" and an "administrative . . . investigation" within the meaning of 31 U.S.C. § 3730(e)(4)(A). *United States ex rel. Mistick PBT v. Housing Auth.*, 186 F.3d 376, 383-84 (3d Cir. 1999); *United States ex rel. Reagan v. E. Texas Med. Ctr. Reg'l Healthcare Sys.*, 384 F.3d 168, 175-76 (5th Cir. 2004). The Ninth Circuit here, however, concluded that the public disclosure bar is triggered only if a document produced pursuant to FOIA is itself a "criminal, civil, or administrative hearing, . . . a congressional, administrative or [General] Accounting Office report, hearing, audit, or investigation, or [is] from the news media." Pet. App. 18. That Respondents can point to superficial points on which the circuits are in agreement (BIO 11) is of no moment. The reality is that in the Third and Fifth Circuits, all documents produced pursuant to FOIA constitute public disclosures, while in the Ninth Circuit, only a small subset of such documents will trigger the statutory bar.

2. Respondents do not deny that the circuits are split, but contend that the split is shallow, describing it as a "crevice." BIO 10, 12. If Respondents are suggesting that further percolation is desirable, that argument should be rejected. First, the Ninth Circuit understood and acknowledged that it was creating a direct circuit conflict. *See* Pet. App. 11-12. The split was thus not accidental, nor is it likely to resolve itself. Second, additional opinions by other courts of appeals are unlikely to further illuminate or

sharpen the issue. The question presented in the Petition is a straightforward matter of statutory interpretation. In fact, the two competing views about the relevant statutory language are already thoroughly set forth and debated in Justice (then-Judge) Alito's opinion for the court and Judge Becker's lengthy dissent in *Mistick*. *Compare* 186 F.3d at 382-85 *with id.* at 392-94.[1]

3. In the Petition, Petitioners noted that the Ninth Circuit buttressed its decision by suggesting that the public disclosure bar should turn on whether the government was actually on notice of the alleged fraud. Pet. 11-15. Respondents do not defend the Ninth Circuit's focus on the government's knowledge but instead argue that the court of appeals' reasoning is irrelevant, because this "Court reviews judgments, not opinions." BIO 14, citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842 (1984). While that is true, Respondents have missed the point. As is explained in the Petition, the Ninth Circuit's reasoning goes well beyond that of its sister Circuits and threatens to exacerbate other existing intercircuit disagreements about the meaning of language

[1] Citing a recent district court decision, Respondents claim that "[l]ower courts have no difficulty applying the statutory bar with guidance from both courts." BIO 12, citing *United States v. Solinger*, ___ F. Supp. 2d ___, 2006 WL 2927509 (W.D. Ky. Oct. 12, 2006). In *Solinger*, the court discussed the circuit split identified in the Petition and decided to follow the Ninth Circuit's decision here instead of the Third Circuit's decision in *Mistick*, finding the former to be "more persuasive." *Id.* at *5. Respondents are thus incorrect in implying that the *Solinger* court attempted to reconcile the circuit split or harmonize *Mistick* with the decision below. To the contrary, the *Solinger* court simply joined one side of the split and, in so doing, deepened it. Presumably other lower courts will continue to do the same, choosing one side or the other. This is precisely why certiorari should be granted.

in the public disclosure bar. Moreover, the Ninth Circuit's expansion of jurisdiction under the False Claims Act beyond that recognized in other circuits will likely lead to forum shopping and make district courts in the Western states attractive to those who, like Relators, obtain documents from the government's own files through FOIA and then conduct "investigations" to assemble arguments that fraud has occurred.[2]

4. Respondents incorrectly suggest that, in order to resolve this case, the Court would be required to answer questions other than the question presented in the Petition. BIO 14-16. Specifically, Respondents argue that the Court, if it grants certiorari, will need to consider the questions (1) "whether a disclosure to the relator is a disclosure that is 'public,' when neither the agency nor the relator discloses to the general public," and (2) "whether 'transactions' of fraud must be disclosed in a single forum." *Id.* 15. Respondents made each of these arguments below. The Ninth Circuit expressly rejected the second argument, *see* Pet. App. 9 n.1, and implicitly rejected the first, as

[2] Respondents also contend that, despite its clear language to the contrary, § 3730(e)(4) is not jurisdictional. They cite authority from the Seventh Circuit, *see* BIO 2 n.1, which appears to have misread this Court's decision in *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 951 (1997) ("[t]he 1986 amendment [to the public disclosure bar] . . . *creates* jurisdiction where none previously existed; it thus speaks not just to the power of a particular court but to the substantive rights of the parties as well") (emphasis in original). Other courts of appeals have concluded that the statute is jurisdictional. *See, e.g.*, *Walburn v. Lockheed Martin Corp.*, 431 F.3d 966, 973 (6th Cir. 2005) ("§ 3730(e)(4) limits the subject matter jurisdiction of federal courts over *qui tam* actions . . . "); *United States ex rel. Grynberg v. Praxair, Inc.*, 389 F.3d 1038, 1048 (10th Cir. 2004) ("[s]atisfaction of the provisions of 31 U.S.C. § 3730(e)(4) is a question of subject matter jurisdiction") (internal quotation omitted).

Respondents appear to acknowledge, *see* BIO 11. Respondents have not sought certiorari on either of these confusing questions, and there would be no need or occasion for the Court to address either question if it were to grant review. The Court routinely declines to consider matters that fall outside the questions presented in a petition for certiorari. *E.g., Archer v. Warner*, 538 U.S. 314, 322 (2003); *West v. Gibson*, 527 U.S. 212, 223 (1999); *see* this Court's Rule 14.1.[3]

Respondents also note that, if this Court were to reverse, the Ninth Circuit would have additional work to do: it would proceed to the questions whether the allegedly "true" facts were also publicly disclosed and whether Respondents were an "original source." BIO 16; *see* Pet. App. 18. Respondents appear to be suggesting that certiorari is appropriate only if the Petitioner can secure a complete and final victory in this Court. Each term, however, the Court routinely issues opinions that require additional proceedings below. In its current posture, this case presents a certiorari-worthy issue. The fact that, following remand, there conceivably could be other scenarios under

[3] In a conditional cross-petition for certiorari, Relators have asked this Court to consider the meaning of the words "based upon" in the public disclosure bar. *See* Pet. in No. 06-473. In their Brief In Opposition, Relators contend that, even if the Court denies the conditional cross-petition, this additional issue "would need to be addressed" and that "the presence of the 'based upon' question complicates this case and makes it a significantly less practicable case for review." BIO 15-16. If the Court denies the conditional cross-petition, there would be no need for the Court to address the "based upon" issue or any other issue. (*See* authority cited at p. 4, *supra*.) If the Court grants the conditional cross-petition, it will, obviously, reach and presumably decide the "based upon" question. In neither event will this case be "unduly complicated," nor will the certiorari-worthiness of the FOIA issue be diminished.

which Petitioners might not ultimately prevail in the litigation should not be a reason for denying review.

5. Respondents argue that this case has "unique facts," making it unsuitable for review. They concede that Dr. Berens' grant application was produced to them pursuant to a FOIA request, but they contend there was no "report" or "investigation" by the government, because NIH, instead of copying the grant application and providing it directly to Dr. Haight, responded to the FOIA request by directing St. Joseph's Hospital to allow Haight to copy it. In *Mistick*, the Third Circuit held that an agency's consideration of, and response to, a FOIA request result in both an administrative "investigation" and "report." 186 F.3d at 383-84; *see also Reagan*, 384 F.3d at 175-76. So too here. NIH investigated Dr. Haight's FOIA request and reported back to her, just as the government agencies did in *Mistick* and *Reagan*. Simply put, in either the Third or Fifth Circuits, the courts would have ruled differently from the Ninth Circuit, notwithstanding the artificial factual issue Respondents attempt to raise about who ultimately copied and handed the document to Haight.

6. In *Rockwell International Corp. v. United States ex rel. Stone*, No. 05-1272, the Court recently granted certiorari to resolve a circuit split over the meaning of the term "original source" in the public disclosure bar. *See* Order of Sept. 26, 2006 in No. 05-1272. Respondents argue that *Rockwell* is unrelated to this case, because the Ninth Circuit did not reach the original source question here. BIO 17. There is, however, a close connection between the public disclosure requirement and the original source requirement. Together, they serve the goal of ensuring that only close insiders, not opportunistic outsiders, may bring *qui tam* suits. Indeed, several courts, including the

Ninth Circuit, have held that the public disclosure requirement is a "quick trigger to get to the more exacting original source inquiry." *Hagood v. Sonoma County Water Agency*, 81 F.3d 1465, 1476 n.18 (9th Cir. 1996), quoting and citing, *inter alia*, *United States ex rel. Precision Co. v. Koch Indus., Inc.*, 971 F.2d 548, 552 (10th Cir. 1992); *see also Cooper v. Blue Cross & Blue Shield*, 19 F.3d 562, 568 n.10 (11th Cir. 1994) (similar).

The court of appeals in this case conflated the public disclosure and original source requirements. It found its holding with respect to the FOIA issue to be supported by its understanding that Haight "put in substantial time and effort into uncovering the allegations the Relators make in their complaint." Pet. App. 17. The court concluded that "Haight performed precisely the sort of investigative work that the *qui tam* provisions of the FCA encourage in order to promote detection of fraud against the government." *Id.* 18. Thus, although the Ninth Circuit did not rule on the original source issue, it relied on original source concepts – that is, notions about the extent to which Relators allegedly originated the information on which they base their FCA claims. This Court likely will address these matters in *Rockwell*, where one of the issues is whether a former Rockwell employee's prediction about an alleged fraud was sufficient to satisfy the "direct and independent knowledge" requirement of 31 U.S.C. § 3730(e)(4)(B). It is, therefore, reasonably possible that the Court's opinion in *Rockwell* will shed light on whether it was appropriate for the Ninth Circuit to base its decision, at least in part, on Haight's "investigative work." Accordingly, if the Court does not grant the Petition, it

should, at a minimum, hold the Petition pending resolution of *Rockwell*.

CONCLUSION

The petition for a writ of certiorari should be granted.

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